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THE MIRAGE CASINO-HOTEL, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NICOLE HOULE,

Plaintiff,

vs.

THE MIRAGE CASINO-HOTEL LLC;
BAR TENDER'S UNION 165,

Defendants.

Case No. 2:17-cv-00258-GMN-GWF

**DEFENDANT THE MIRAGE CASINO-
HOTEL, LLC'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Defendant, The Mirage Casino-Hotel, LLC (hereinafter referred to as "The Mirage"), hereby moves to dismiss all claims asserted against it in Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiff's claims are barred by the availability of an adequate statutory remedy. Moreover, Plaintiff failed to exhaust her administrative remedies with respect to her claims alleging a hostile work environment and retaliation thereby subjecting the claims to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1). This Motion is made and based upon the following Memorandum of Points and Authorities, all pleadings and papers on file herein, as well as any oral argument permitted by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND INFORMATION

On February 6, 2017, Plaintiff filed a First Amended Complaint ("FAC") against The Mirage and Bartenders Union Local 165 (hereinafter referred to as "the Union") alleging the following

causes of action: (1) sexual harassment/hostile work environment (against The Mirage); (2) retaliation (against The Mirage); (3) intentional infliction of emotional distress (against all defendants); (4) negligent supervision, training, and retention (against all defendants); and 5) breach of duty of representation (against the Union).¹ In her FAC, Plaintiff alleges that during her employment with The Mirage, she was subjected to and witnessed sexually inappropriate conduct directed towards and engaged in by her co-workers. (ECF No. 6 at ¶¶10-12). Plaintiff contends that such conduct created a hostile work environment. (ECF No. 6 at ¶¶47-48). Additionally, Plaintiff alleges that she reported the alleged conduct to The Mirage's Human Resources Department on multiple occasions which subsequently resulted in the suspension and eventual termination of four of her co-workers. (ECF No. 6 at ¶¶17-19, ¶24, ¶30, ¶32). Two of Plaintiff's co-workers (Lindsay Howard and Dariusz Nastal) who were terminated filed grievances which resulted in their reinstatement. (ECF No. 6 at ¶¶33-34). Plaintiff alleges that she was subjected to retaliation by Howard and Nastal following their reinstatement. (ECF No. 6 at ¶¶42-43).

In her FAC, Plaintiff fails to identify any statutory basis for her hostile work environment and retaliation claims. However, sexual harassment/hostile work environment and retaliation are unlawful employment practices prohibited by state and federal laws. Specifically, Title VII of the Civil Rights Act of 1964 ("Title VII") and NRS 613.330-613.340 prohibit such employment actions. Nevertheless, Plaintiff failed to file a charge of discrimination to exhaust her administrative remedies as required by statute. **Exhibit A (Declaration of Cindy Moehring in Support of Motion to Dismiss at ¶4).**² As a result, Plaintiff's first cause of action alleging sexual harassment/hostile work environment and second cause of action alleging retaliation must be dismissed due to her failure to

¹ Plaintiff had previously filed a Complaint against The Mirage and the Union in the District Court for Clark County on November 2, 2016. On January 30, 2017, the Union removed this matter to this Court. (ECF No. 1). The Mirage subsequently joined in the Union's removal. (ECF No. 10).

² The Ninth Circuit has held that material properly submitted with the complaint (i.e. exhibits under FRCP 10(c)) may be considered as part of the complaint for purposes of a Rule 12(b)(6) motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1990); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (overruled on other grounds) (a defendant may attach to a Rule 12(b)(6) motion the documents referred to in the complaint to show that they do not support plaintiff's claim). Therefore, although a court's review of a Rule 12(b)(6) motion to dismiss is generally limited to the contents of the complaint, the court may also consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice without converting the motion into a motion for summary judgment. *See Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). Plaintiff's FAC is absent of any assertion that she exhausted her administrative remedies as required by statute, which is separately confirmed by the Declaration of Cindy Moehring in Support of Motion to Dismiss.

1 exhaust her administrative remedies.

2 Furthermore, Plaintiff's third cause of action alleging intentional infliction of emotional
3 distress ("IIED") and fourth cause of action alleging negligent supervision, training and retention are
4 based solely upon the allegedly unlawful employment practices which serve the basis for Plaintiff's
5 first and second causes of action. Specifically, Plaintiff's IIED claim is premised upon the alleged
6 hostile work environment created by Nastal and alleged retaliation towards Plaintiff by Howard and
7 Nastal. (ECF No. 6 at ¶62). Likewise, Plaintiff's negligent supervision, training and retention claim
8 is premised upon the creation of an allegedly hostile work environment by Nastal and/or Howard as
9 well as the alleged retaliation towards Plaintiff by Nastal and Howard. (ECF No. 6 at ¶¶68-70).
10 Because Plaintiff's IIED and negligent supervision, training and retention claims are based upon the
11 same alleged unlawful employment practices which serve the basis for her first and second claims,
12 her IIED and negligent supervision, training and retention claims are barred by the availability of an
13 adequate statutory remedy. Accordingly, Plaintiff's third and fourth causes of action should also be
14 dismissed against The Mirage.

15 **II. LEGAL ARGUMENT**

16 **A. Standard for Dismissal**

17 **1. Rule 12(b)(1)**

18 Dismissal under Rule 12(b)(1) is appropriate where the Court lacks subject matter
19 jurisdiction. A plaintiff must exhaust her administrative remedies for claims of harassment and
20 retaliation in order for a court to obtain subject matter jurisdiction over those claims. *B.K.B. v. Maui*
21 *Police Dept.*, 276 F.3d 1091, 1099 (9th Cir. 2002). Importantly, "a party invoking the federal
22 court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction."
23 *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). In this case, Plaintiff's FAC is devoid of
24 any factual assertion that she exhausted her administrative remedies with respect to her first and
25 second causes of action. Therefore, the Court lacks subject matter jurisdiction over Plaintiff's claims
26 for sexual harassment/hostile work environment and retaliation thereby warranting dismissal of
27 those claims.

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1 **2. Rule 12(b)(6)**

2 Pursuant to Rule 12(b)(6), a party may move for dismissal for failure to state a claim for
3 which relief may be granted. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does
4 not need detailed factual allegations, a plaintiff is obligated to provide the grounds of his entitlement
5 to relief which requires more than labels and conclusions-- and a formulaic recitation of the elements
6 of a cause of action will not do. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Factual
7 allegations must be enough to raise a right to relief above the speculative level, on the assumption
8 that all the allegations in the complaint are true (even if doubtful in fact)” *Id.* (citations
9 omitted).

10 In *Ashcroft v. Iqbal*, the United States Supreme Court explained:

11 To survive a motion to dismiss, a complaint must contain sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is
13 plausible on its face.’ A claim has facial plausibility when the plaintiff
14 pleads factual content that allows the court to draw the reasonable
15 inference that the defendant is liable for the misconduct alleged. The
16 plausibility standard is not akin to a ‘probability requirement,’ but it
 asks for more than a sheer possibility that a defendant has acted
 unlawfully. Where a complaint pleads facts that are ‘merely consistent
 with’ a defendant’s liability, it ‘stops short of the line between
 possibility and plausibility of ‘entitlement to relief.’

17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). The law is clear that “only a
18 complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679 (citations
19 omitted).

20 **B. Plaintiff’s Tort Claims Are Precluded by the Availability of An Adequate**
21 **Statutory Remedy**

22 In her FAC, Plaintiff asserts claims for hostile work environment, retaliation, IIED and
23 negligent supervision, training and retention against The Mirage. Plaintiff fails to identify a
24 statutory basis to support her claims for hostile work environment and retaliation. Therefore, it
25 appears that Plaintiff is attempting to assert tort-like claims for a hostile work environment and
26 retaliation. Such claims are not cognizable and are precluded by the availability of an adequate and
27 comprehensive statutory remedy. Specifically, Title VII and Nevada law (NRS 613.330-613.340)
28 prohibit the alleged employment practices which serve the basis for Plaintiff’s first and second

1 causes of action against The Mirage. Accordingly, Plaintiff must proceed under either or both of
2 those statutes in order to state viable claims for a hostile work environment and retaliation.

3 As this court recognized in *Brinkman v. Harrah's Operating Co., Inc.*, "N.R.S. § 613.330 *et*
4 *seq.* provides the exclusive remedy for tort claims premised on illegal employment practices. The
5 Nevada Supreme Court as well as the District Court for the District of Nevada have held that tort
6 claims premised on discrimination in employment are remedied under the statute." *Brinkman v.*
7 *Harrah's Operating Co., Inc.*, 2008 U.S. Dist. LEXIS 123992, at *5 (D. Nev. Oct. 16, 2008).

8 The Nevada Supreme Court has repeatedly rejected attempts to create tort remedies when an
9 available statutory remedy exists. *See, Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 216 P.3d 788
10 (2009) (refusing to recognize a common law claim when the plaintiff had an alternative remedy
11 available to him under the federal Railway Labor Act); *Chavez v. Sievers*, 118 Nev. 288 (2002)
12 (refusing to recognize a common law cause of action for employment discrimination when the
13 employer was not statutorily covered by NRS 613.330 and Title VII); *Shoen v. Americo, Inc.*, 111
14 Nev. 735, 744 (1995) (refusing to recognize a public policy tort based upon an employee's allegation
15 that he was wrongfully terminated for testifying because a comprehensive statutory remedy existed
16 in NRS 50.070); *Sands Regent v. Valgardson*, 105 Nev. 436, 439-40 (1989) (rejecting the plaintiff's
17 attempt to expand the public policy exceptions to the at-will doctrine in order to include age
18 discrimination because "the Legislature has addressed the gravity of violating Nevada's public
19 policy against age discrimination by defining the extent of the remedy available to parties injured by
20 such discrimination."). When an adequate statutory remedy exists, the Nevada Supreme Court has
21 repeatedly and uniformly held that no additional court-created tort remedies under common law are
22 available because it would be unfair to the defendant. *Ozawa*, 216 P.3d at 791 (citing *D'Angelo v.*
23 *Gardner*, 107 Nev. 704, 720 (1991)). Therefore, Plaintiff's hostile work environment and retaliation
24 claims fail and should be dismissed due to the availability of an adequate statutory remedy in Title
25 VII and/or NRS Chapter 613.

26 Additionally, Plaintiff's IIED and negligent supervision, training and retention claims are
27 premised upon exactly the same alleged conduct which serves the basis for her hostile work
28 environment and retaliation claims. (ECF No. 6 at ¶¶62, ¶¶68-70). As noted above, NRS 613.330 *et*

seq. provides the exclusive remedy for tort claims premised upon illegal employment practices. *Brinkman*, 2008 U.S. Dist. LEXIS 123992, at *5 (dismissing claims for IIED and negligent supervision because NRS §613.330 provides the exclusive remedy for claims premised on illegal employment practices). This Court has repeatedly held that when tort claims are premised upon the same alleged illegal employment practices, such allegations do not give rise to a separate common law tort claim. *Schaefer v. Diamond Resorts Int'l Mktg.*, 2015 U.D. Dist. LEXIS 55511, at *17-18 (D. Nev. Apr. 28, 2015) (dismissing the plaintiff's IIED claim because it was based upon the same alleged illegal employment practices underlying her discrimination claims); *Jackson v. Universal Health Servs.*, 2014 U.S. Dist. LEXIS 129490 (D. Nev. Sept. 15, 2014) (dismissing the plaintiff's IIED and negligent training and supervision claims because they were based upon the same allegations of illegal racially discriminatory practices for which NRS 613.330 is the exclusive remedy). The law does not allow multiple bites of the apple based upon identical conduct by simply renaming causes of action. Therefore, Plaintiff's third and fourth causes of action fail as a matter of law and should be dismissed.

C. Plaintiff Failed To Exhaust Her Administrative Remedies

As explained above, a hostile work environment and retaliation are employment practices prohibited by Title VII and Nevada law (NRS 613.330-613.340). Both federal and state laws require that "plaintiffs must... exhaust their administrative remedies before seeking judicial relief from discriminatory action." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984); 42 U.S.C. § 2000e-5(e); *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005) (requiring timely exhaustion of administrative remedies through Nevada Equal Rights Commission); NRS 613.405; NRS 613.420. Because Plaintiff failed to exhaust her administrative remedies, her claims alleging unlawful employment practices (i.e., a hostile work environment and retaliation) against The Mirage are subject to dismissal. **Exhibit A.**

The requirement to exhaust administrative remedies mandates that a plaintiff file a timely charge with the United States Equal Employment Opportunity Commission ("EEOC") or the Nevada Equal Rights Commission ("NERC"), thereby allowing the agency time to investigate the charge. *See* 42 U.S.C. § 2000e-5(a) (empowering the EEOC to prevent unlawful employment practices

1 under Title VII); NRS 613.405 (empowering NERC to receive complaints of unlawful employment
 2 practices); NRS 233.157; *B.K.B.*, 276 F.3d at 1099 (“The administrative charge requirement serves
 3 the important purposes of giving the charged party notice of the claim and ‘narrowing the issues for
 4 prompt adjudication and decision.’”) (quoting *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472
 5 (D.C. Cir. 1976)). Further, each discrete incident of discriminatory or retaliatory treatment
 6 constitutes its own unlawful employment practice for which administrative remedies must be
 7 exhausted. *See Nat’l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002).
 8 The court does not have subject matter jurisdiction over matters that fall outside the scope of a
 9 plaintiff’s charge of discrimination. *B.K.B.*, 276 F.3d at 1099; *see also, Sosa v. Hiraoka*, 920 F.2d
 10 1451, 1456 (9th Cir. 1990).

11 Here, Plaintiff’s FAC is completely devoid of any factual assertion that she filed a charge of
 12 discrimination with either the EEOC and/or NERC. Moreover, wholly absent from Plaintiff’s FAC
 13 is any factual assertion that she timely exhausted her administrative remedies with respect to her
 14 unlawful employment practice claims against The Mirage. Indeed, Plaintiff did not exhaust her
 15 administrative remedies. **Exhibit A.** Because Plaintiff failed to exhaust her administrative
 16 remedies, she is precluded from pursuing her hostile work environment and retaliation claims in
 17 court. *Vinieratos v. United States*, 939 F.2d 762, 769 (9th Cir. 1991) (exhaustion of administrative
 18 remedies is a statutory condition to suit under Title VII); *Dosier v. Miami Valley Broadcasting*
 19 *Corp.*, 656 F.2d 1295 (9th Cir. 1981). Accordingly, Plaintiff’s first and second causes of action fail
 20 for this additional reason and must be dismissed accordingly.

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1 **III. CONCLUSION**

2 For the reasons set forth above, The Mirage requests that this Court grant its Motion to
3 Dismiss thereby dismissing all claims asserted by Plaintiff against The Mirage.

4 Dated: February 14, 2017

6 /s/Sandra Ketner

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